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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 83 5195

GEORGE ENNIS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, GEORGE ENNIS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 23, 1982. A concurring opinion was filed on April 12, 1983. A petition for rehearing was denied on June 3, 1983.

DATED: August 1, 1983

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QUESTION PRESENTED FOR REVIEW

IS THE FOURTH AMENDMENT VIOLATED BY A COAST GUARD NIGHTTIME SEARCH OF A VESSEL FOR CRIMINAL ACTIVITY, CONDUCTED WITHOUT A SEARCH WARRANT AND UNDER THE GUISE OF A DOCUMENT OR SAFETY INSPECTION, IF DONE PURSUANT TO AN ADMINISTRATIVE PLAN REQUIRING NIGHTTIME INSPECTIONS, IN THE ABSENCE OF A FOUNDED SUSPICION OF CRIMINAL ACTIVITY AND REGARDLESS OF THE CIRCUMSTANCES UNDER WHICH THE SEARCH WAS CONDUCTED?

PARTIES TO THE PROCEEDINGS

In the District Court criminal case there were three defendants -- petitioner Ennis, James Eagon, and Thomas Herrmann. All three defendants appealed their convictions. The appeals were consolidated for review and a single opinion covering the appeals was issued by the Ninth Circuit. United States v. Eagon, 707 F.2d 362 (9th Cir. 1982). Codefendant Hermann is also filing a petition for a writ of certiorari in this Court. Thomas Herrmann v. United States, No. _____. Pursuant to Rule 19.4 of this Court, petitioner Ennis joins in the petition for certiorari filed by petitioner Herrmann.

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REFERENCE TO OFFICIAL REPORTS

The published opinion of the Court of Appeals, decided November 22, 1982, and the concurring opinion, filed April 12, 1983, are reported as United States v. Eagon, 707 F.2d 362 (9th Cir. 1982). A copy of that opinion is attached to this Petition as Appendix A. A petition for rehearing was denied on June 3, 1983. A copy of the order denying the petition for rehearing is attached to this Petition as Appendix B.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 22, 1982. A concurring opinion was filed on April 12, 1983, while a petition for rehearing was pending. The petition for rehearing was denied on June 3, 1983. No application for an extension of time in which to file this Petition has been filed. Jurisdiction of this Court is invoked under the provisions of Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Four

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 14, United States Code, Section 89(a)

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and

use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

STATEMENT OF THE CASE

Jurisdiction of the District Court and Court of Appeals

Petitioner Ennis hereby joins in the statements regarding jurisdiction in the petition for a writ of certiorari filed by codefendant Herrmann. Herrmann Petition at 3.

Statement of Proceedings Below

Petitioner Ennis hereby joins in the statement of proceedings made by codefendant Herrmann. Hermann Petition at 3-11.

Petitioner Ennis was charged with the same four offenses as Herrmann. The evidentiary record submitted to the District Court on the motion to suppress and the stipulated facts trial was the same for both petitioner Ennis and petitioner Herrmann.

Petitioner Ennis was found guilty of all four offenses in a joint stipulated facts trial before the District Court with petitioner Herrmann.

On January 7, 1982, petitioner Ennis was sentenced to a split sentence on all four counts -- three years imprisonment with all but six months suspended and two years probation, with two year special parole terms on the substantive counts (Counts One and Three). All sentences were ordered to run concurrently.

Statement of Facts

A full statement of relevant facts are contained in the reported opinion of the Court of Appeals, United States v. Eagon, supra, 707 F.2d at 363-64, and in the petition of codefendant Herrmann. Herrmann Petition at 3-11. No useful purpose would be served by repeating these factual statements herein.

REASONS FOR GRANTING THE WRIT

THE FOURTH AMENDMENT WAS VIOLATED BY A COAST GUARD NIGHTTIME SEARCH OF A VESSEL FOR CRIMINAL ACTIVITY, CONDUCTED WITHOUT A SEARCH WARRANT AND UNDER THE GUISE OF A DOCUMENT OR SAFETY INSPECTION, DONE PURSUANT TO AN ADMINISTRATIVE PLAN REQUIRING NIGHTTIME INSPECTIONS, IN THE ABSENCE OF A FOUNDED SUSPICION OF CRIMINAL ACTIVITY AND REGARDLESS OF THE CIRCUMSTANCES UNDER WHICH THE SEARCH WAS CONDUCTED.

Petitioner Ennis hereby joins in the issues raised by petitioner Herrmann[1/] and the explication of reasons for granting the writ of certiorari made by petitioner Herrmann. Herrmann Petition at 11-30. Petitioner Ennis would only add the following additional points.

The opinion of the Ninth Circuit holds that a nighttime Coast Guard search of a vessel for evidence of criminal activity, without a warrant and under the guise of a document or safety inspection, is per se lawful if done pursuant to an administrative plan requiring nighttime or safety inspection, in the absence of a founded suspicion of criminal activity or violation of Coast Guard regulations and regardless of the factual circumstances under which the search was conducted. In the process of reaching that conclusion the Court ignored some of the most fundamental

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1/ The evidentiary record on the sufficiency of evidence issue as to petitioner Ennis is identical to that of petitioner Herrmann. Herrmann Petition at 8-9. A passport of Ennis' was found on the REVERIE just like in Herrmann's situation.

parts of Fourth Amendment legal analysis, that is, a balancing of the objective and subjective intrusion occasioned by the search against the governmental need for such a search. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Delaware v. Prouse, 440 U.S. 648 (1979) and a determination of whether, if that test is met, the search was conducted relying on the least intrusive means consistent with the governmental need to search, Florida v. Royer, ___ U.S. ___, slip opinion at 9, 13 (March 23, 1983); United States v. Piner, 658 F.2d 358, 360-61 (9th Cir. 1979); United States v. Watson, 678 F.2d 765, 767-68, 771 (9th Cir. 1982). The opinon also ignores several legal issues raised in the Ninth Circuit. Herrmann Petition at 28-30.

The opinon of the Court of Appeals does not even discuss the need for such searches, although that omission is perhaps understandable since the record in the instant case is completely devoid of any evidentiary record or governmental articulation of the governmental need for such document and safety inspections.

The opinion of the Court of Appeals does mention less intrusive means of conducting searches, but completely misapprehends the vantage point of such analysis by stating "[t]hat there was no feasible less intrusive means of complying with the order because it was explicitly directed at this vessel." 707 F.2d at 365 (emphasis added). The correct analysis logically is whether the need for such document and safety inspections can be accomplished by less intrusive means, Florida v. Royer, supra; United States v. Piner, supra, and whether the operations order adopts that least intrusive means, not whether there was a less intrusive means of complying with the order. The operation order required nighttime inspections; there was no showing made by the government of why daytime inspections could not

accomplish any legitimate administrative governmental purpose. Under the legal analysis in the present opinon of the Ninth Circuit the most outrageous, unreasonable, and most onerous means of accomplishing inspections could be set forth in an operations order and so long as the officer in the field has no less intrusive means of complying with the order, the order is reasonable and the search lawful. Such a holding cannot be consistent with the Fourth Amendment. Quite simply, in the instant case, there is no reason why, and no showing by the government why, the operations order could not have been limited to daytime inspections instead of expressly being limited to nighttime inspections.

Finally, the opinion of the Ninth Circuit makes the lack of discretion in the officer in the field, operating under an administrative plan, the sole and determinative factor as to the reasonableness of a search. Under the Ninth Circuit's opinion, the most onerous, unreasonable, and outrageous of searches, conducted in Draconian fashion using the most onerous means of searching would be reasonable and therefore lawful so long as the officer in the field has no means of minimizing its intrusiveness through use of discretion.

In making the balancing determination between the objective and subjective privacy intrusion and governmental need for the search the amount of discretion left to the stopping officer is but one element and depends upon the nature of the stop. In the instant case the stop was made by an officer who apparently believed he had no discretion whether or not to make the stop but instead felt required to made the stop, although he had discretion as to where to patrol, within certain limits, and how long to stay out on patrol. However, since the instant stop was done as part of a roving patrol the subjective intrusion remains just as great as if the officer had complete discretion as to

to whether to make the stop.[2/] Thus the lack of discretion herein does not diminish the degree of subjective intrusion; the critical factors in determining the degree of subjective intrusion are the nature of the stop -- i.e., checkpoint or roving patrol -- and how it is conducted.

Nor, logically, does the presence or lack of discretion in the stopping officer affect the amount of governmental need in this case. Since the purpose of the search herein was supposedly to make a documents compliance check there is no reason why this purpose could not sufficiently be accomplished during daylight hours; reliance on such less intrusive means eliminates the need for stops and boardings after dark.

The very recent case of United States v. Villamonte-Marquez, ___ U.S. ___ (June 17, 1983)(No. 81-1350) does not compel rejection of the above analysis. In Villamonte-Marquez a customs search of a vessel was deemed "reasonable" under the Fourth Amendment even when there was no reasonable suspicion of criminal activity. However, Villamonte-Marquez involved a daytime boarding, not one required to be conducted at nighttime as commended by the operations order in the instant case. Thus an obvious less intrusive alternative -- daytime inspections -- was readily available herein. No explanation has ever been given, either by the government or the Ninth Circuit, why this less intrusive alternative could not be used to successfully accomplish any governmental purpose. In contrast, in Villamonte-Marquez this Court found a critical factor in differentiating between automobile and vessel stops was that, in the context

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2/ This is to be contrasted to the situation where the stopping officer has no discretion, but makes his stops at a traffic checkpoint. There the subjective intrusion is much less due to the nature of the traffic checkpoint stop, where all those stopped can see that everyone else is being stopped also.

of the facts of that case, no possible less intrusive alternative type of stop was available that would accomplish the governmental purpose. Slip Op. at 8-14. In the instant case, unlike Villamonte-Marquez, weapons were drawn or displayed by the Coast Guard during the stop and boarding, and the crew of the REVERIE ordered about, thus heightening even further the subjective intrusion of the nighttime stop. Further points of material distinction between Villamonte-Marquez and the instant case are mentioned by defendant Herrmann and need not be repeated here. Herrmann Petition at 21-23.

CONCLUSION

For this Court to adopt the position of the Ninth Circuit that the lack of discretion in the stopping officer makes the search reasonable and lawful, regardless of how unreasonable the stopping officer's orders are, would mean that the protections of the Fourth Amendment would disappear under the administration practice of ordering mandatory stops of everyone by the officer in the field -- on every street or in every vehicle, vessel, or airplane, or any other public or private place. It would result in the complete evisceration of the Fourth Amendment and put all persons and their Fourth Amendment rights at the mercy and whim of every administrative or law enforcement agency and the supervisory bureaucracy in that agency.

For all of the above reasons the petition for a writ of certiorari should be granted.

DATED: August 1, 1983

Respectfully submitted,

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10A] was in the possession, control and custody of the United States." The government clearly had a right to have its evidence unimpaired during the pendency of the trial, and this right was violated by appellant's admitted theft of the government's exhibit.

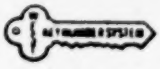
[2] Appellant argues that "ownership" of the money taken did not lie with the government, as the government has never instituted forfeiture proceedings with regard to this money. As mentioned, the district court cited *O'Reilly v. United States*, 486 F.2d at 210, and *Roma v. United States*, 53 F.2d at 1008-09, for the proposition that the government acquires an interest in property which is subject to forfeiture at the time of the illegal use. While this rationale could be used as an alternate basis for a finding of a sufficient government interest, we do not find it necessary to our holding in this case. Regardless of who is (subsequently) adjudged to be the owner of the property in question, the United States had custody of the money under a claim of right, and clearly this right of possession and control would extend through the pendency of the trial. Even if the United States later has to return the money to appellant (or someone else), the government's right of possession at the time of the theft is unquestionable.

[3] Appellant also argues that it was legal error to charge him with a violation of 18 U.S.C. § 641, which carries a maximum penalty of ten years and a ten-thousand dollar fine, when (arguably) two other statutes that carry less severe penalties, 18 U.S.C. §§ 2252 and 2253 (1976), could have formed the basis for the prosecution. This court has recently stated that "[t]he decision to charge a particular defendant with one offense and not another is a matter within the discretion of prosecuting authorities." *United States v. Sedovic*, 679 F.2d 1233, 1236 (8th Cir.1982). It is sufficient that we find appellant guilty of the charge brought against him, and the hypothetical applicability of other statutes is irrelevant to this determination.[3]

Conclusion.

We hold that the government's Exhibit 10A was a "thing of value of the United States" for purposes of 18 U.S.C. § 641. Accordingly, after thorough consideration of the record and the parties' submissions, we affirm appellant's conviction.

3. On March 9, 1983, appellant filed a motion with this court for leave to file an untimely reply brief, or for remand to the district court, or for a stay of this appeal on the basis of this court's remand to the district court on the question of whether the seizure of evidence in the underlying drug case was legal. 700 F.2d 1232 (8th Cir.1983). We denied this motion on March 29, 1983. The question of the possible suppression of evidence in the underlying drug case does not impact on our holding in the instant appeal because at the time of the theft the government had possession of the money under the claim of right. In any event, the question of "suppression" of evidence should be left to the courts, rather than to the self-help remedy employed by appellant.



UNITED STATES of America, Plaintiff-Appellee,

v.

James EAGON, George Eanis, Thomas Herrmann, Defendants-Appellants.

Nos. 82-1030, 82-1031 and 82-1083.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 12, 1982.

Decided Nov. 22, 1982.

Rehearing Denied June 3, 1983.

Defendants were convicted in the United States District Court for the Northern District of California, Spencer Williams, J., of drug offenses, and they appealed. The Court of Appeals, Merrill, Circuit Judge, held that nighttime stop of vessel pursuant to directive ordering the stop of all vessels

of a certain length headed inshore between 9:00 p.m. and 5:00 a.m. on certain dates did not violate the Fourth Amendment.

Affirmed.

Boochever, Circuit Judge, filed a concurring opinion.

1. Searches and Seizures ⇐7(1)

Nighttime stop of vessel by Coast Guard for safety and document inspection pursuant to order directing the boarding of all shore-bound vessels of a certain length between the hours of 9:00 p.m. and 5:00 a.m. on certain dates in a certain area did not violate the Fourth Amendment, even in the absence of probable cause to suppose a violation of the law and even if the administrative plan which led to the stop was motivated partly by suspicion of drug smuggling. U.S.C.A.Const.Amend. 4.

2. Criminal Law ⇐1036.8

Defendants could not contend for the first time on appeal that stipulation of facts did not contain sufficient evidence to sustain their convictions.

George A. Sherinian, Santa Cruz, Cal., for Eagon.

Daniel F. Cook, Asst. Federal Public Defender, San Jose, Cal., for Eam.

Barney Elders, Santa Cruz, Cal., for Herrmann.

Ledia Schoggen, Asst. U.S. Atty., San Jose, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California.

Before MERRILL and BOOCHEVER, Circuit Judges and SMITH*, District Judge.

MERRILL, Circuit Judge:

Following a stipulated facts trial, appellants were found guilty of four counts of drug offenses in violation of 21 U.S.C. §§ 841(a)(1), 846, 952(a) and 963. On this appeal they challenge an order denying their motion to suppress marijuana and certain documents seized as a result of a warrantless search and the introduction of those items into evidence. At issue is the right of the Coast Guard without warrant to board a vessel at night for safety and document inspection, pursuant to an administrative plan, without founded suspicion of a violation of regulations.

I.

On December 5, 1980 an operations order was issued by the Coast Guard Commander of the Twelfth Coast Guard District which set up a schedule of harbor blockades designating the dates, locations and officers to be involved. The order noted that "smuggling activity increases during the holiday season" and required that enforcement patrols be conducted looking to enforcement of document and safety regulations, apparently pursuant to the Coast Guard regulation on marine document production, 46 C.F.R. § 67.73-1 (1980). The operation's code name was "Merry Jane", a slang term for marijuana.

The Monterey Group was directed to conduct 12 blockades including blockades at Morro Bay and Monterey Bay between December 12, 1980 and January 12, 1981 between the hours of 9:00 p.m. and 5:00 a.m. during which the Coast Guard group was to board all shore-bound vessels 200 feet in length or less. One of the scheduled blockades was set for December 18, 1980 with Chief Petty Officer David Wickstrom named as primary boarding officer in command of Coast Guard Vessel 41367, a 41 foot Coast Guard patrol boat with a four-man crew.

At about 10:45 p.m. on December 18, Wickstrom and the 41367 proceeded to Moss Landing on the California Coast to rendezvous with another Coast Guard vessel, the Cape Wash. Wickstrom failed to locate it and headed north. Proceeding towards Santa Cruz, the crew noticed on its radar a "large contact" which Wickstrom assumed

* Honorable Russell E. Smith, Senior District Judge, United States District Court for the District of Montana, sitting by designation.

to be the Cape Wash. The radar then showed a smaller contact or "blip" leaving the larger one, which Wickstrom assumed was a smaller vessel which had been boarded by the Cape Wash. The 41367 soon sighted the smaller craft which then changed course dramatically. The 41367 continued toward the larger vessel and discovered that it was not the Cape Wash but a sailing vessel, the Reverie. When first sighted the Reverie's lights were not turned on and it was stationary, but as the 41367 approached the Reverie turned on its lights and began to move shoreward. The 41367 manuevered alongside the Reverie. Wickstrom noted that its fenders were hanging over the side and that its hatches were open. The crews of the two vessels engaged in some casual conversation in which one of the three members of the Reverie crew indicated that they were having some clutch problems and were heading for Morro Bay. The 41367's coxswain then directed the Reverie to "heave to and prepare to be boarded." Wickstrom testified that his only purpose in boarding was to verify the vessel's compliance with safety and document regulations pursuant to the operations order.[1]

After boarding, Wickstrom could see through an open hatch several bales wrapped in burlap with vegetable matter protruding. He then summoned the Cape Wash and upon its arrival the Reverie crew was taken aboard. The Reverie was towed into Monterey. Coast Guard officers conducted an inspection in the course of which approximately 4,000 pounds of marijuana were found. They also found passports of the three appellants, a receipt for the marijuana, and ownership documents of the Reverie. Appellants were placed under arrest.

Before the District Court, appellants unsuccessfully sought to suppress the marijuana and documents found on the Reverie.

II.

On this appeal, appellants contend that under this Court's holding in *United States v. Piner*, 608 F.2d 358 (9th Cir.1979), the motion to suppress should have been granted because a warrantless boarding and search of a vessel by the Coast Guard after dark constitutes a violation of the Fourth Amendment in absence of probable cause to suppose a violation of law. We agree with the District Court that *Piner* does not apply.

Piner involved a random stop of a pleasure vessel at night in San Francisco Bay. The sole purpose had been to ascertain and discourage noncompliance with safety regulations. There was nothing about the stopped vessel to suggest noncompliance.

It was the random character of the *Piner* stop that most concerned us. In *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S.Ct. 1391, 1400, 59 L.Ed.2d 660 (1979), on which we relied in *Piner*, the Court had spoken strongly on the subject. The Court there dealt with random stops of motor vehicles for spot checks of registration and licensing. It stated that without reasonable suspicion of violation "we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Id.* (citations omitted).

The Government in *Piner* strongly defended random spot checks, arguing that the practice served as an alternative to the stopping of all pleasure vessels and that without the random and unexpected charac-

1. Wickstrom noted several suspicious circumstances suggesting illegal activity aboard the Reverie. It initially was stationary and unlighted, but began to move shoreward and turned on its lights soon after the sighting; its fenders were over the side; its hatches were left open; and a smaller vessel which had just left the Reverie suddenly changed course. Because we hold that the search was conducted under administrative standards which removed Wickstrom's discretion in deciding whether to search, however, we need not decide whether these suspicious circumstances constituted "a reasonable and articulable suspicion of noncompliance . . ." *United States v. Piner*, 608 F.2d 358, 361 (9th Cir.1979).

ter of the stop, much of its effectiveness as a discouragement of noncompliance would be lost. The Government asserted that:

> [R]andom stops are the only practicable means of ascertaining pleasure craft compliance with safety regulations, * * * [W]ithout authority to conduct random stops the congressional purpose of maritime safety will, in the case of pleasure craft, be frustrated.

608 F.2d at 361.

We noted the usefulness of the random spot check but felt that that usefulness could be accomplished by a less intrusive exercise of the practice. We stated:

> If the purpose of the random stop is to ascertain and discourage noncompliance with safety regulations, we see no reason why this purpose cannot sufficiently be accomplished during the daylight hours.

Id. We held:

> A stop and boarding after dark must be for cause, requiring at least a reasonable and articulable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer.

Id.

[1] The fact that the stop and boarding in this case was not random but was pursuant to an operations order completely distinguishes *Piner*. *United States v. Watson*, 678 F.2d 765, 773 (9th Cir.1982). Here Wickstrom had no choice under the order but to board the Reverie. As in *Watson* "the stop did not involve an exercise of discretion by an officer in the field but instead was conducted pursuant to an administrative plan." *Id.* at 773. There was no feasible less intrusive means of complying with the order because it was explicitly directed at this vessel.[2]

Appellants contend that verification of documents and safety compliance was a pretext for a criminal investigative search. They point to the order's reference to smuggling activities and the name given to the operation. The same contention was advanced and rejected in *Watson*. There we stated:

> We assume that the administrative plan which led to the stop of the GLOBE TROTTER was motivated partly by suspicion of drug smuggling. However, the stop and search had an independent administrative justification, and did not exceed in scope what was permissible under that administrative justification. Therefore, we need not consider any criminal enforcement interest the Coast Guard may have had.

Id. at 771. To the same effect is *United States v. Arra*, 630 F.2d 836 (1st Cir.1980), where the court stated:

> We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers.

Id. at 846.[3]

III.

[2] For the first time on appeal, appellants contend that the record does not support conviction since the stipulation of facts does not explicitly state that the three appellants constituted the Reverie's crew and were present on board when the vessel was boarded. The appellants made no objection to the sufficiency of the evidence below and this contention will not be entertained here. *United States v. Veon*, 474 F.2d 1, 3 (9th Cir.1973); *United States v. Perdue*, 460 F.2d 1195, 1203 (9th Cir.1972).

JUDGMENT AFFIRMED.

BOOCHEVER, Circuit Judge, concurring:

I believe that Judge Merrill's opinion is in accord with our decisions in *United States*

2. We note that in most maritime cases it would not be feasible to establish a less intrusive means by use of checkpoints such as those used for stops of motor vehicles. Although we discuss motor vehicle stops by way of analogy, our discussion is not intended to comment on the legality of roving road stops.

3. We may also note, as administrative justification for the order in our case, that an increase in the presence of noncomplying vessels may well follow from an increase in smuggling, because a vessel engaged in smuggling would seem a better than random choice for noncompliance.

v. Piner, 608 F.2d 358 (1979), and *United States v. Watson*, 678 F.2d 766 (9th Cir.), *cert. denied*, — U.S. —, 103 S.Ct. 451, 74 L.Ed.2d 606 (1982). In *Piner*, we concluded that a stop after dark must be for cause and added the dictum that the boarding "must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer." 608 F.2d at 361. Here, we are confronted with an administrative order removing discretion.

It is contended that the document inspection might be considered a pretext, as one of the purposes of the administrative order as indicated by its code name of "Merry Jane" was an attempt to interdict the traffic of marijuana into the United States. That contention has been answered by *Watson*, which holds that even if a purpose of the boarding is to stop smuggling it is permissible if the stop and search had an "independent administrative justification, and did not exceed in scope what was permissible under that administrative justification." 678 F.2d at 761.

We should therefor look to the scope of the boarding activity under the particular circumstances involved. Those living on their boats have a greater expectation of privacy at night. *See United States v. Piner*, 608 F.2d 358 (9th Cir. 1979). The boarding in this case, however, involved no invasion of sleeping quarters. Wickstrom, in charge of the boarding party of two, testified that the only purpose of the boarding was to verify the vessel's compliance with safety and document regulations. Once aboard, the officers did not appreciably move from their positions on deck. They asked the master to retrieve the documentation papers from the cabin and did not enter it themselves. The marijuana which was seized was seen in plain view from the officers' positions above deck. The boarding, itself, involved no intrusion into the living quarters of the Reverie crew.

As was stated in *United States v. Streifel*, 665 F.2d 414 (2d Cir. 1981), there is

> . . . no basis for denying the government the use of investigatory stops at sea in the fact that many vessels include living quarters for their owners or their crew. While one has a more legitimate expectation of privacy in one's living quarters than in other areas, this expectation has greater relevance to the scope of a search than to the intrusiveness of a stop.

665 F.2d at 423.

I would confine our holding to the facts of this case, leaving for another day a decision as to whether a more intrusive search could be performed at night.

I also concur in the result for another reason. The facts justifying the stop are adequately summarized in footnote 1 of the opinion. Under those circumstances I believe that the boarding was justified under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), as based on reasonable suspicion.

WEYERHAEUSER CO., a Washington Corp., Plaintiff-Appellee,

v.

RELIANCE INSURANCE CO., Surety for Combustion Equipment Assoc. Inc., A New York Corp., and Combustion Corp., A California Corp., Defendants-Appellants,

and

Williams Patent Crusher and Pulverizer Co., Inc., a Missouri Corp., Third Party Defendant.

No. 81-3098.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 6, 1983.

Decided April 14, 1983.

Rehearing and Rehearing En Banc Denied June 10, 1983.

W.A. Jerry North, Schwabe, Williamson, Wyatt, Moore & Roberts, Portland, Or., for defendants-appellants.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 03 1993
PHILLIP B. WHINERY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JAMES EAGON, GEORGE ENNIS, THOMAS HERRMANN, Defendants-Appellants.	Nos. 82-1030, 82-1031 and 82-1083 (N.D. California) O R D E R

Before: MERRILL and BOOCHEVER, Circuit Judges, and SMITH*, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court was advised of the suggestion for en banc rehearing; a request was made that a vote be taken on the suggestion; and the court determined not to take the case en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Russell E. Smith, Senior District Judge, United States District Court for the District of Montana, sitting by designation.

REC'D
AUG. 1, 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 83 5195

GEORGE ENNIS,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Petitioner, GEORGE ENNIS, pursuant to Rule 46 of this Court and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis. Petitioner was represented by appointed counsel in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: August 1, 1983

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
NOV 1 1983
ALEXANDER L. STEVAS,
CLERK

Nos. ~~83-176 and~~ 83-5195

In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS HERRMANN, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE ENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-176

THOMAS HERRMANN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-5195

GEORGE ENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the warrantless nighttime boarding of their vessel by Coast Guard officers violated their Fourth Amendment rights because the boarding was not based on reasonable suspicion or probable cause. They also argue that the court of appeals should have reached their sufficiency of the evidence claim even though they did not raise it in the trial court.

1. After a bench trial on stipulated facts in the United States District Court for the Northern District of California, petitioners were convicted on one count of importing marijuana (21 U.S.C. 952); one count of conspiring to commit that offense (21 U.S.C. 963); one count of possessing marijuana with intent to distribute it (21 U.S.C. 841(a)(1)); and one count of conspiring to do so (21 U.S.C. 846).[1] Petitioner Herrmann was sentenced to four concurrent terms of two years' imprisonment, to be followed by a two-year special parole term. Petitioner Ennis was sentenced to four concurrent terms of three years' imprisonment, all but six months of which were suspended in favor of probation. He also received a two-year special parole term. The court of appeals affirmed (Pet. App. 41-58).[2]

a. The evidence at the suppression hearing showed that on the evening of December 18, 1980, petitioners' sailing vessel, the Reverie, was discovered to be smuggling some 4,000 pounds of marijuana into this country from Costa Rica. Acting pursuant to a recently issued Coast Guard operations order, a Coast Guard vessel approached and boarded the Reverie to check its documentation. In the course of that boarding, petitioners' illicit cargo was discovered.

On December 5, 1980, the Commander of the Twelfth Coast Guard District issued an operations order that established a schedule of harbor blockades. The Coast Guard group in the Monterey, California area was directed to conduct 12 nighttime blockades at Morro Bay and Monterey Bay between December 12, 1980, and January 12, 1981.

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[1]Co-defendant James Eagon was convicted on the same counts with petitioners, and his conviction likewise was affirmed on appeal. He has not petitioned for a writ of certiorari.

[2]References to "Pet. App." are to the appendix to No. 83-176.

During those blockades, the group was to board and check the documentation of all shorebound vessels that were 200 feet or less in length. Pet. App. 32, 42-43.

One blockade was scheduled for the night of December 18. That evening, Chief Petty Officer David Wickstrom was in command of Coast Guard Vessel 41367, a 41-foot patrol boat. At about 10:45 p.m., Wickstrom and his crew attempted to rendezvous with a larger Coast Guard vessel. When they failed to locate that vessel, the 41367 headed north along the California coast toward Santa Cruz. Radar revealed a large vessel that Wickstrom assumed to be the second Coast Guard ship. A second, smaller "blip" then appeared on the radar. The 41367 soon sighted that craft, which sharply altered its course when it neared the Coast Guard boat. Pet. App. 33-34, 43-44. The 41367 then approached the larger vessel and discovered that it was not a Coast Guard ship but rather was the Reverie. The Reverie was stationary; its lights were off; its hatches were open; and fenders were hanging over the side. As the 41367 approached, the Reverie turned on its lights and began to move toward shore. *Id.* at 34-35, 44. The 41367 directed the Reverie to heave to, and Wickstrom boarded to verify the ship's compliance with documentation and safety regulations, as directed by the operations order (*id.* at 45). Once aboard, Wickstrom looked through an open hatch and saw several bales that were wrapped in burlap and appeared to contain marijuana. A later search revealed some 4,000 pounds of marijuana, along with petitioners' passports and a receipt for the illicit cargo (*id.* at 35, 45). Petitioners were then arrested.

b. Prior to trial, petitioners moved to suppress the items discovered as a result of the boarding. Before the district court, and again on appeal, they argued that the boarding violated *United States* v. *Piner*, 608 F.2d 358 (9th Cir. 1979), because it occurred at night. Both courts below

rejected this claim, distinguishing *Piner* on the ground that the boarding here was not random but rather was made pursuant to an administrative directive (Pet. App. 38-39, 46-51). Judge Boochever concurred and additionally was of the view that the boarding was based on reasonable suspicion of criminal activity (*id.* at 55-58).

2. Petitioners contend (83-176 Pet. 11-25; 83-5195 Pet. 7-11) that the warrantless boarding of their vessel at night, without any founded suspicion of criminal activity, violated their Fourth Amendment rights. However, this Court's decision in *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), which approved suspicionless boardings of vessels for documentation inspections, puts to rest petitioners' claims.

In *Villamonte-Marquez*, the Court approved the Customs Service's powers, under 19 U.S.C. 1581(a) and 46 U.S.C. 277, to make suspicionless boardings of vessels in inland waters to check for compliance with documentation laws. There is no reason why the same rule should not apply here: indeed, there is even greater justification for applying it to a boarding of a shorebound vessel in territorial waters. See *Villamonte-Marquez*, slip op. 6 n.4. The fact that the Coast Guard, rather than the Customs Service as in *Villamonte-Marquez*, is involved in this case is also immaterial since the Coast Guard's authority under 14 U.S.C. 89(a) is virtually the same as that accorded Customs officials under 19 U.S.C. 1581(a) and stems from the same source. See *Maul* v. *United States*, 274 U.S. 501, 504-507 (1927); *United States* v. *Demanett*, 629 F.2d 862, 866-867 (3d Cir. 1980), cert. denied, 450 U.S. 910 (1981); *United States* v. *Freeman*, 579 F.2d 942, 946 (5th Cir. 1978).[3] Nor is it

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[3]We also note that, as both the district court and one judge of the court of appeals found (Pet. App. 37-38, 58), Officer Wickstrom possessed reasonable suspicion for boarding the Reverie. When the Coast Guard patrol boat approached, the Reverie was stationary

significant that the boarding here occurred at night. The statute does not limit boarding authority to daytime, and surreptitious violations of navigation and border laws are, if anything, more likely to occur at night. As the court below recognized (Pet. App. 49-50), there were no less instrusive means available to the Coast Guard, and (while we do not believe this was necessary to sustain its coinstitutionality) the boarding was conducted under an administrative plan that left the Coast Guard officers no discretion as to what boats were to be stopped and boarded. See *United States* v. *Watson*, 678 F.2d 765, 773 (9th Cir.), cert. denied, No. 82-555 (Nov. 29, 1982). Accordingly, further review is unwarranted.[4]

3. Petitioners also argue (83-176 Pet. 25-29; 83-5195 Pet. 7 & n.1) that there was insufficient evidence to support their convictions.

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and had no lights on, yet its fenders were down and its hatches were open as if it had just rendezvoused with the small craft that the Coast Guard boat had seen. When the patrol boat approached, the Reverie turned on its lights and began to move toward shore. These circumstances were certainly sufficient to lead an experienced officer to suspect that criminal activity was afoot.

[4]Petitioners claim (83-176 Pet. 14-15) that the boarding was illegal because the documentation inspection was a pretext for a criminal investigation. However, *Villamonte-Marquez* rejected the argument that the boarding officers' motivation may undermine an otherwise valid boarding and document check (slip op. 4-5 n.3).

Petitioners also contend (83-176 Pet. 28-29) that the court below should have decided whether an administrative warrant was required for the boarding here and whether a search warrant was required for the subsequent search. But the claim that an administrative warrant is needed in a case such as this was raised in *Villamonte-Marquez* (see 81-1350, Resp. Br. 36-37), and implicitly rejected by the Court. See slip op. 15 n.10 (Brennan, J., dissenting). In addition, the court of appeals implicitly rejected petitioners' claim when it held, under its own precedents, that the carefully drafted administrative standards here were sufficient to remove any improper discretion from the executing officer.

As previously noted, petitioners were arrested aboard the Reverie, which was laden with some 4,000 pounds of marijuana. Also seized from the vessel were a receipt for the illegal cargo and documents showing that petitioners had recently left Costa Rica. In district court, petitioners did not contest the sufficiency of the evidence against them. Instead, after their suppression motions were denied, they agreed to be tried on stipulated facts so that they could preserve their right to appeal their Fourth Amendment claims. In the court of appeals, they argued for the first time that the stipulated facts were insufficient because the stipulation did not "explicitly state that the three appellants constituted the *Reverie's* crew and were present on board when the vessel was boarded" (Pet. App. 52). The court of appeals declined to review petitioners' claim, since they had not raised it before the trial court.

Petitioners renew their objection before this Court, but their argument is insubstantial. First, it is by no means clear that the stipulation fails to establish their presence on the Reverie. For example, the stipulation stated (para. 6) that witnesses from the Coast Guard vessels would testify to their observations during the stop of the reverie. That testimony unquestionably would have identified petitioners and co-defendant Eagon as the members of the boat's three-man crew. Moreover, as the court of appeals held, petitioners' agreement to proceed by stipulation, combined with their failure to raise their present objection in district court, barred them from raising it on appeal. The plain error rule (Fed. R. Crim. P. 52 (b)) "was intended to afford a means for the prompt redress of miscarriages of justice" and applies only where the trial is "infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States* v. *Frady*, 456 U.S. 152, 163 (1982). Here,

since there is not the slightest doubt that petitioners were present on the vessel, any defect in the stipulation does not constitute plain error. To recognize a "plain error" in such circumstances would create, not redress, a miscarriage of justice.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11